not be quite so damning a criticism of those judges as it might at first appear. Judges, after all, are generalists in function, as much by design as by necessity, and very often the considered thought of those who specialize in the field fails for years, even decades, to make its way into the corridors of practical decision making. On the other hand, it is also entirely possible that the theoretical foundation of free speech has failed the judges, has broken down at the point where it was needed in the field, causing the confusion exemplified by a case like Shokie. Which of these is true is the issue we now pursue.

There are other reasons behind the organizational scheme I have chosen. We need, as we so often do, to trace the general outlines of our existing thought patterns to be in a better position to appreciate the significance of a different perspective. This is especially true when, as here, the pieces of the new perspective already exist in the crevices of our present methods of thinking and, especially, in the often overlooked criticisms to those methods. Ultimately, I believe, it is only by feeling the nature, and indeed the justice, of the desire to punish speech acts that we will ever be able to arrive at a true understanding of the social benefits potentially to be derived from tolerating that behavior.

2

The Classical Model and Its Limits

When we are deciding whether some rule should govern a dispute, especially if the dispute is thought to be a borderline case, a familiar and sound injunction is that before venturing an answer, we should first know what the basic purposes are behind the rule. Despite both its familiarity and its soundness, however, the injunction is frequently ignored. But our neglect makes it no less valid. Without knowing what we are trying to achieve by a particular rule, we cannot sensibly proceed to offer an intelligent opinion about which facts from the mass of worldly detail are important and which irrelevant, about how much weight ought to be given to the facts that are deemed relevant and about how the various elements of the problem ought finally to be resolved in a judgment—however inscrutable the process of rendering that “judgment” might seem to, or actually be.

So it is with free speech. A case like Shokie requires us to refer back to fundamentals. If, as it was frequently argued and tacitly assumed to be, Shokie was a case at the margins of the First Amendment, then we need to know something about the “core” of the First Amendment, about its underlying suppositions and premises, about what we seek to accomplish by the amendment, before we can decide what to do at any point along the periphery. Under our inherited ways of thinking about free speech—what
in this chapter I refer to as the classical model—that core is conceived to be the speech we truly value.

That is to say, the logic of the classical vision of the First Amendment takes the following form: Since it is "speech" we are protecting under the free speech principle, it must be because some speech is of great importance to us. It follows that any "theory" of the First Amendment must proceed from an inquiry into why having the liberty to speak is valuable in the first place. Contemporary analysis of free speech follows this theoretical path, but theorists disagree about which identifiable "values" ought to be given precedence over others.

In this chapter we begin by examining what over time people have identified as the principal values of speech. Then we will be in a good position to say, first, how much value from a free speech perspective there is in a case like Shokie and, second, whether that positive value is sufficient to outweigh in our minds the individual and social harm caused by that speech.

We consider here the essential, elemental characteristics of the traditional, libertarian vision of freedom of speech. We seek an overview of the structure of thought that people bring to controversies over the regulation of speech, and in particular that they bring to cases like Shokie. We deal with the first line of defense of free speech—with the response you are likely to get if you asked the question Why do we have a principle of free speech in this society?

The classical vision of free speech has antecedents stretching far back in time. The primary connection is with the period of the Enlightenment, in the eighteenth century, when the interest and faith in man's powers of reason flourished and when there occurred that enormously important revolution in the way people conceived of the relationship between the state and the individual members of the society.1 Two cardinal premises about social organizations arose from this transformation in thought: first, that the government is possessed of only limited political powers, which it derives from the citizenry; second, that the people themselves, as the ultimate sovereign, are competent to determine their own destinies. Out of these premises there arose that momentous political experiment, the American Revolution, which scholars like Bernard Bailyn describe as having "reconceived the fundamentals of government and of society's relation to government."

How do these reconceived notions match our contemporary realities? How well does the rhetoric of the preceding two centuries describe what is occurring today in the realm of freedom of speech?

I

In today's discourse about free speech, the dominant value associated with speech is its role in getting at the truth, or the advancement of knowledge.2 Speech is the means by which people convey information and ideas, by which they communicate viewpoints and propositions and hypotheses, which can then be tested against the speech of others. Through the process of open discussion we find out what we ourselves think and are then able to compare that with what others think on the same issues. The end result of this process, we hope, is that we will arrive at as close an approximation of the truth as we can.

This idea is so familiar to us that we may overlook its significance. Other benefits of speech can be, and sometimes are, recommended. Speech, it is sometimes said in contravention to the truth-seeking conception of free speech, should be specially protected because it plays a critical role for each individual in achieving self-fulfillment through the act of self-expression, and not because of the practical benefits it yields in the way of uncovering truths about the world; or because our basic social morality dictates that every member of society be treated as an equal, with dignity and respect.3 Still, the practical benefits of gathering information and ideas for the truth-building process continue to be the major attraction claimed for speech and hence the basis of our contemporary theory for the free speech principle.
In recent decades, however, the value of speech for seeking truth has been thought about in a narrower context—that is, in the political context of democratic self-government. In a democracy, it is commonly said, speech performs an essential role in assisting the citizens in their collective search for answers to the issues they face. Professor Zechariah Chafee, the first major American scholar of the First Amendment, wrote in his book *Free Speech in the United States* that the First Amendment protects "two kinds of interests"; one is "a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way," and the other is an "individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living." The individual interest Chafee identified has played a secondary role to the social interest he mentioned, and the social interest has come to mean primarily a political interest.

One of the seminal works on the value of freedom of speech for a democratic society is an essay written in 1945 by the philosopher and educator Alexander Meiklejohn. Entitled simply "Free Speech and Its Relation to Self-Government," Meiklejohn's essay developed what to many has seemed a self-evident but nonetheless highly significant thesis: The principle of free speech plays a practical role for a self-governing society, protecting discussion among the citizens so that they can best decide what to do about the issues brought before them for decision. If one has chosen to live in a self-governing society, Meiklejohn argued, it follows as a matter of course that the government is, and ought to be, forbidden from interfering with any speech by the citizens that is concerned with the performance of their sovereign functions. A *Robert's Rules of Order* may be necessary and appropriate, but beyond that the citizens can brook no further interference into their political dialogue.

As his paradigm for thinking about the functions of free speech, Meiklejohn (like so many others) took the traditional New England town meeting, at which the citizens regularly met "as political equals." Order was imposed by the moderator, but no idea as such could be suppressed. This was because the citizens, as ultimate sovereigns, needed to make their own decisions and the best decisions they could: "Now in that method of political self-government," Meiklejohn wrote, "the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting." In this setting, all viewpoints must be given an opportunity to be heard: "Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed."

For Meiklejohn, then, as for Chafee, it appeared to be the relationship of speech to the results, to the outcomes of the deliberations, that made speech activity worthy of special protections. Because all citizens in the community share an interest in the results, the protection of speech serves a "collective" interest and not, as Chafee had added, any single individual interest in self-expression. In the final analysis, '[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said.'

Under his theory Meiklejohn limited the scope of protection afforded by the First Amendment to "political" (or, as he referred to it, "public") expression. This limitation was not quite so severe as it at first seemed, for when many objected that much valuable speech (like artistic expression) would go unprotected under his theory, Meiklejohn acknowledged the importance of such speech and denied that his theory precluded protection of it. Since it was "relevant" to political decision making, it could
therefore be included in the category of “political” speech. Knowledge of Shakespeare is as essential to wise political decisions as any explicitly political expression, Meiklejohn condescendingly rejoined.¹⁴

Meiklejohn’s ideas about how the political functions of speech justify and define the concept of freedom of speech have become a major part of the modern idiom of the First Amendment. We now hear regularly that speech is an essential tool to a self-governing society. A commitment to democracy, it is said, entails within it an agreement that governmental power to deprive citizens of the opportunity to discuss openly all public issues must be sharply restricted. Open discussion is touted for its role in improving the quality of decisions. Practical, concrete benefits are said to flow to the political community from this process, and it is these collective social benefits that we protect through the First Amendment. A recognition of the primacy of political dialogue has emerged in the thinking and judicial decisions regarding the free speech principle.¹⁵

The principal Supreme Court decision that most embodies these features of the modern First Amendment is New York Times Co. v. Sullivan.¹⁶ At issue in Sullivan was the constitutionality of state common law rules relating to defamation—at least as applied to suits brought by public officials who seek damages against the press for false statements made about them. In deciding whether to apply constitutional strictures to these common law actions, the Court worked from the basic premise that in a democracy the “people, not the government, possess absolute sovereignty,” in the words of James Madison.¹⁷ From this premise the Court reasoned that the government had no business interfering with, or seeking to limit, public criticism by citizens of their elected representatives. The “central meaning of the First Amendment,” the Court thus pronounced, must be that a regime of seditious libel, under which citizens could be punished for exercising their sovereign right to criticize the government, was unconstitutional.¹⁸ Instead of trusting the citizens to exercise their political prerogatives, in such a regime the state had usurped these functions for itself.

From this notion of the core meaning of free speech, the Court was able to approach the issue of common law defamation rules by asking whether they were sufficiently analogous to the seditious libel regime to warrant constitutional trimming. To this question the Court answered with a qualified yes, concluding that defamatory statements of fact must be protected to some extent (absent knowledge of falsity or reckless disregard of the truth) in order to shelter the legitimate interests of citizens in exercising their sovereign governmental powers. The Court saw virtue in creating an environment in which speech was “uninhibited, robust, and wide-open.”¹⁹

Sullivan was a landmark decision for the First Amendment. In a famous article on the Sullivan opinion that appeared the same year, Professor Harry Kalven pointed out how the Court had for the first time given the First Amendment a theoretical starting point in the finding that the “central meaning of the First Amendment” was the disallowance of any regime of seditious libel.²⁰ The “clear and present danger” test—whatever one might think of it as a test—had been theoretically empty.²¹ What Sullivan, did, therefore, Kalven pointed out, was to tie the meaning and function of the free speech principle to the structure of the political system, identifying its vital role in a democratic system of government. In doing this, of course, the Court had essentially adopted the Meiklejohn approach, Kalven pointed out.²² Ironically, the Sullivan opinion nowhere mentioned Meiklejohn, but Kalven’s article confirmed the association and it thereafter became axiomatic.²³

This Meiklejohn-Sullivan alliance, with its heavy emphasis on the practical importance of freedom of speech for a democracy, can be traced through many subsequent First Amendment cases.²⁴ It provides the core structure around which much First Amendment discourse and many opinions are built. Because it has achieved a kind of ascendancy as a free speech theory, we
must give it our close attention. But once we do, we quickly
discover that the relationship between a free speech principle
and a self-governing society is more ambiguous than we com-
monly suppose or are told. Once we have sorted out that am-
biguity, we can then begin to evaluate to what extent the
identified virtues of speech justify a free speech principle as we
have come to know it.

II

The Meiklejohn-Sullivan perspective on the central meaning of
the first amendment harbors at its roots a profound confusion.
The difficulty rests in its assumption that a commitment to the
democratic system of government entails a comparable unqual-
ified commitment to a free speech principle as we know it. The
error consists in taking a point that is valid in one context into
another context where it may well have no, or at best only limited,
explanatory power.

It is quite correct to argue, as Meiklejohn and Sullivan did,
that a self-governing society cannot tolerate a government that
seeks to usurp the sovereign decision making authority of the
citizens by denying them the opportunity to hear ideas and views-
points. But that is not the same thing as saying that we, the
citizens, must in a self-governing society agree, without more,
that we cannot choose to limit and regulate speech activity within
the society and remain a self-governing community. A regime
of seditious libel imposed by the government, acting independ-
ently of the democratic procedures, as Kalven noted, "strikes at
the very heart of [a] democracy." "Political freedom ends when
government can use its powers and its courts to silence its crit-
ics." But if the people themselves, acting after full and open
discussion, decide in accordance with democratic procedures that
some speech will no longer be tolerated, then it is not "the gov-
ernment" that is depriving "us," the citizens, of our freedom to
choose but we as citizens deciding what the rules of conduct
within the community will be. Then the "democracy" has func-
tioned, and it may be asked whether it does not "[strike] at the
very heart of [a] democracy" to say that the citizens cannot choose
to make that decision.

It may well be true that there is a point in the regulation of
speech activity at which "we," as self-governing citizens, may strip
ourselves (or a part of the community) of the capacity to exercise
self-government in any realistic sense; then it would be correct
to say to us that our commitment to self-government entails a
limit on our freedom to engage in such an act of political self-
dispossession. The point now has coherence. Just as we might
properly claim to be defending liberty if we stop a man from
exercising his liberty to sell himself into slavery, so might we
properly claim to be defending democracy if we stop a majority
from voting to convey upon the government the power to punish
all public criticism of the state.85

This caveat does not take one very far, or at least not far
enough to account for most of what has been happening under
the banner of free speech in this century. Even if one concedes
the essential validity of the argument just presented (as being
either coherent or persuasive), it will justify intervention into
the democratic decision making relating to speech activity only
in order to preserve the minimally essential conditions of a "dem-
ocratic" society. That, of course, is itself a highly ambiguous
standard, but it would seem reasonably clear that few if any of
the restrictions on speech we have encountered over the last
sixty years, and the rejection of which now form the basis of our
First Amendment jurisprudence, could be fairly described as
jeopardizing the elemental structure of a democracy—or, stated
another way, that the absence of these regulations was the sine
qua non of a democratic political system.

If, then, we ask what "we" as citizens in a political community
committed to a democratic process would choose to take as the
limits on "our" power to regulate speech activity within the so-
ciety, we might have to accept the minimal limit we have just
noted and we might choose to accept more. But our acceptance
of that greater limit would certainly not automatically be com-
pelled by the fact that we had already committed ourselves to
resolve issues between us according to a democratic norm of
majority vote.

Here, however, a point must be emphasized. Thus far we have
concluded that to commit ourselves to democracy, without more,
is at most to commit ourselves to a free speech principle that is
strong enough to curtail governmental interference with speech
activity when that interference is designed to usurp the sovereign
prerogatives of the citizenry, and to refrain from regulating
speech ourselves to such an extent that self-government is no
longer reasonably feasible. But this does not mean that we may
not appropriately choose to structure our political and social sys-
tem in such a way as to put into effect a more vigorous and
thoroughgoing free speech principle. We may decide, as indeed
most of us would probably be eager to do, that our “democracy”
will mean something more than a raw principle that majority
rule on all matters shall prevail. That choice, however, must be
explained by more than a reference to our commitment to “self-
government” and to examples where the state is reclaiming the
autocratic political authority of the pre-Revolution English kings.
It seriously overloads the term democracy with unstated and un-
clear meanings to give it greater content, as happens in opinions
like Sullivan.

We can agree, then, that speech, even highly extremist speech,
goût to be “protected” under a free speech principle from
restriction by a government that is seeking to deprive the political
community of the chance to decide itself what to do about the
speech. This agreement derives from our commitment to a demo-
cratic political system. We have an interest in preserving the
opportunity to exercise self-governance, but this is not the limit
of the free speech principle we have developed or are now at-
ttempting to explain. The First Amendment has not been con-
ained to imposing limits on errant, undemocratic, official efforts
to control speech but on democratically sponsored efforts as well.

It is that limit that must be justified but cannot by simple ref-
erence to a preexisting choice for democracy.

Courts and writers too often end their analysis at the point
where they have proclaimed the function of free speech to be
to stop “the government” from interfering with the sovereign
authority of “the people,” and the reader is left with the image
of unrestrained governmental power being checked by the
courts. Such a portrait usually falsifies the reality, masking a
deeper conflict within the political community itself, out of which
the regulation at issue emerged with the support of a majority
of the citizens. Yet, courts have not considered it relevant in free
speech cases to inquire into the democratic pedigree of the reg-
ulations at issue, and then extend their approval to those shown
to have the requisite papers—as both Sullivan and Shokie de-
monstrate. We shall later consider why courts tend to portray the
world as other than it usually is in this regard (or, at least, stop
considerably short of describing it accurately), including their
role in it. For now, however, we bypass that question and con-
tinue considering whether there is any good reason to be found
in the classical model why we should accept the limitations im-
posed on our own regulatory powers by the free speech
principle.

Let us focus our attention on the principal free speech “value”
already identified: our practical interest in reaching the truth or
wise decisions. (In the end, the same questions can, and will, be
raised about the explanatory power of the self-fulfillment ra-
ationale.) Whether one defines the truth-seeking enterprise
broadly or narrowly (as limited to the political arena), the ad-
vantages of free speech to that enterprise are said to justify
extending special protection to speech activity. How and when
are these benefits likely to be realized?

There is obvious validity to the general idea. One need not
go through the elaborate trial of argument, from Socrates to
John Stuart Mill to Holmes and on to the present, to concede that few if any of us believe we are able single-handedly to arrive at the truth. From personal experience, all of us can draw on numerous instances where the process of open discussion advanced our understanding and led us to abandon falsehoods we once held as firm truths. From those experiences alone we should be, and are, disposed to recognize that toleration of at least some speech is essential to improve our chances of reaching the best possible judgments on the issues we are called upon to decide.

This claim must not be pushed too far. It is possible, of course, to argue, as Mill did, that since we can never know for sure that what we believe is true, we ought to be prepared to listen to everything, however convinced we are of its error. But this is unacceptable. In a case such as Saksie, the chance that the Nazi messages may turn out to be “true” is hardly a persuasive basis on which to defend such speech, and few if any free speech advocates turned to this kind of argument in that context. The more we believe in the immorality or error of the ideas being expressed through the speech, the more attenuated is the truth-seeking advantage claimed as the justification for the free speech principle. The “value” to us in these terms ranges from remote to none. Just as in libel area the Court has sometimes recognized no “value” in defamatory false statements of fact, so we might appropriately extend that to at least some portion of the realm of opinion as well.

Suppose in deciding on the merits of toleration we begin with the assumption not that what is being said may be true but rather that it is false. Are there then positive benefits from a truth-seeking perspective that support protection? Here we encounter two primary arguments for speech protection.

First is Mill’s major alternative argument for toleration. Through confrontation with falsehood, Mill argued, people retain a “livelier” sense of the truths they themselves already hold but which may have become stagnant: Through censorship, Mill claimed, we “lose, what is almost as great a benefit [as truth], the clearer perception and livelier impression of truth produced by its collision with error.” Truth requires regular exercise, as it were, and without it it atrophies into dogma.

A second claim for protection of false or bad speech focuses not on the benefits to us from interaction with it but rather on an important informational gain we may acquire simply by hearing the falsehood expressed. Meiklejohn’s essay can be read to make this kind of argument, though it is by no means explicit. It is more readily found in Chafee’s Free Speech in the United States. In any event, the basic idea is that by listening to extremist speech, we benefit simply by becoming aware of the presence within the society of this kind of dissatisfaction and dissent. To have such knowledge can be important to us in our policymaking role because we may want to take action—by improving educational and employment opportunities, housing conditions, and so on—to allay the underlying grievances we think may have given rise to the dissent. It is also usually preferable to have these potentially disruptive individuals and groups operating in public rather than in private, where the unwanted weeds of frustration and revolt may grow more rapidly from inattention and where the falsehoods being propagated may less easily be exposed for their error. A policy of near complete openness to speech, in this sense, provides us with a social thermometer for registering the presence of disease within the body politic and the best opportunity of administering a speedy cure.

As before, we must acknowledge the validity of these arguments as general propositions. While they are generally valid, whether or not any of these benefits will accrue sufficiently in a particular case, or even a group of cases, is at the very least an open question. One may seriously doubt, for example, whether it is always true that open confrontation with falsehood yields, or is necessary to, a richer belief in truth. Are the uninhibited activities of groups like the Nazis really that important to maintaining a vigorous belief that what they have to say is immoral and wrong? It seems an equally plausible theory as to some ideas,
at least, that to regard them as unspeakable is the best method of rejection. Like all human activities, dialogue is not invariably useful under all conditions.

To emphasize this and other points, we might look at our behavior in another area of social life where speech activities pose difficulties in a context in which truth seeking is also a primary objective. Take the system of criminal justice and the regulations that govern jury trials. Here, where ascertaining truth is a basic aim of the process, our rules recognize both how speech is important to that primary goal and how speech has the potential to thwart that goal. We secure the right of the parties to present their respective arguments on the issues to be decided. But they may not speak in any way they wish. We take people as they are, and the system accordingly assumes that the process of rationality we prize so heavily may be undermined by speech itself, in particular by speech that is "inflammatory" or that may produce an improper "emotional" response. Some evidence will be excluded because of its potential for prejudicing the jurors' judgment, because they will be inclined to give it more weight than it deserves. Furthermore, we impose various limitations on the manner of presenting arguments in the court, because respect for the process itself, or the individuals involved in that process, is also regarded as a prime value.

Such rules for governing speech in the forum of the criminal jury trial are suggestive, if not indicative, of the range of considerations that must be taken into account in deciding what limits there ought to be on speech activity. This is not to suggest that the particular resolution of the problem of limits that we observe there ought to be repeated in the general political forum, with which the First Amendment is primarily concerned. But the comparison certainly forces on our attention the need for a more extensive explanation of speech protection than the simple claim for truth seeking offers. In fact, just as with the argument from self-government, it may be argued with considerable force that an interest in seeking truth cuts against rather than in favor of speech protection in cases like Shokie and other extremist cases where, for example, the speech seeks to subvert the truth-seeking process itself. At the extremes, the values associated with the "core" speech become proportionately attenuated. Yes, we agree (as we imagine in our minds an Isaac Newton, a Thomas Paine, a Henry Moore), speech and discussion are vital to the search for truth, to the operation of democracy, and to individual self-expression, and we do value those ends greatly. But as the nature of the speech we consider moves progressively away from these most admirable kinds of expression, these great values associated with speech lose much of their force and may even be threatened by the speech itself, so that, now, to subscribe to those values seems to compel prohibition instead of protection.

Thus, we see that at the same time there is an attenuation in the benefits associated with speech in the extremist speech case, there can simultaneously occur an escalation in the potential harm from the speech itself. The invocation of the generally accepted values of rationality and self-government and self-expression no longer work so smoothly; in fact, their invocation cuts in a sharply divergent direction on the issue of tolerance or intolerance of the speech activity. These thoughts are variations of the classic paradox for free speech (noted in chapter 1): a commitment to a principle of free speech can lead to protection of those who would advocate the abolition of free speech itself. And these thoughts were probably behind Wigmore's incredulity at the idea that in a democracy we should permit activities designed and intended to interfere with and upset the legitimately reached decisions of that system, by means other than through democratic procedures. As we have now seen, the same paradox can be found with respect to arguments for free speech based on its importance to individual autonomy and truth seeking: should a commitment to either purpose result in the protection of those who seek to destroy those values?

We need not rely on paradox alone, or deny altogether the potential for any of the benefits normally associated with speech activity, in order to feel that a persuasive case has yet to be made for the protection of such speech. The full question is not simply
whether some benefits may be realized through toleration but whether we think those benefits are sufficiently great to outweigh the competing harms we will suffer if we choose that course. It is possible to imagine several advantages (even of the kind generally associated with exposure to speech activity) from being subjected to robbery, but their acquisition would hardly induce us to take up a banner for the right to rob. We must, therefore, now turn to the problem of assessing the harm from speech, especially speech of the kind in the Shokie case.

III

The whole subject of the harm speech can cause is curiously dealt with under the classical free speech model. After a close and disinterested study of it, it is hard not to find truth in Wigmore's general accusation that free speech proponents frequently seriously underestimate the costs of tolerance of certain speech, especially extremist speech.

At the outset of this chapter, it was noted that the historical antecedents of contemporary libertarian theory regarding freedom of speech are primarily to be found in the Enlightenment period of the eighteenth century, when belief in the power of rationality, especially of the “common man,” was widely proclaimed. Out of this development of the assumption of universal, inherent rationality the movement for democracy arose. It justified granting citizens the power of sovereignty. Additionally, it shaped how libertarians conceived of the harmfulness of speech.

When Milton argued for repeal of the British licensing system in 1644, his appeal was to a trust in the power of reason. He denied that falsehoods would ever prevail over truths, charging that to believe otherwise was an insult to Truth: “And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”

Milton’s statement, taken from another era and out of its context, may sound naive and unduly optimistic, but it reflects a widespread attitude reflected throughout Western liberal thought and encountered in contemporary discussions about free speech issues. Speech, especially speech that advocates an idea, is only a prelude to action and really causes no harm. Only “acts” bring harm, not “words”—as the sticks-and-stones refrain of our childhood proclaims. Speech is either entirely innocuous or will be stopped naturally from causing harm when confronted by the truth. If words near action, which, of course, may produce injury, we may then properly intervene to protect ourselves—as the “clear and present danger” test allows. Holmes’s opinion in Abrams can be read to offer a repetition of Milton’s optimistic forecast:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

If we may borrow a metaphor from the Enlightenment figure Adam Smith, Holmes may be read as suggesting the presence of an unseen hand that guides truth to victory over the challenge of falsity.

To the extent that contemporary general thinking considers speech capable of producing harm, it identifies two potential risks: Speech may persuade people to do things that are socially undesirable and it may offend people who find the ideas expressed objectionable. As for the risk of persuasion, Milton’s and Holmes’s proposal that truth will naturally emerge victorious, if true, means there is little reason to be concerned. Often in free speech cases it will also be pointed out how unlikely it was that
the speaker would persuade anyone in the immediate audience. Recall how Holmes referred to the Abrams defendants as mere "puny anonymities," suggesting that any concern over the dangerousness of these individuals was grossly exaggerated, even preposterous. "Nobody can suppose," Holmes thought it relevant to argue, "that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." The social consequences of the defendant's act were reduced to its potential to shape the behavior of others in the immediate context of the speech act. “[W]hatsoever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.” Holmes concluded in a later case.

Even when persuasion is a real possibility, it is commonly said, still other means are at our disposal short of outright prohibition and punishment for countering the risk: Answer with your own arguments, it is said. We can trust our citizens to distinguish right from wrong, truth from error. To permit prohibition of this speech is to underestimate their skills, as well as to deny them the opportunity to be educated through the use of those skills. Faith in the average citizen, or in the collective body of them, is a catechismal answer of the classical libertarian vision.

As for the offense suffered by listeners, another line of argument is advanced that reduces the asserted harm to consequential proportions. "Don't listen" or "Avert your eyes" is generally recommended. In Skokie, for example, free speech proponents regularly pointed out that those individuals who were likely to be offended by the Nazi message could easily avoid becoming upset by taking advantage of readily available means of self-help—they could stay at home or enjoy a picnic in the countryside or simply do what they would have done anyway, which in all probability would have kept them out of earshot and eyesight of the events at the village hall. Since one need not suffer, the federal court of appeals appeared to reason, it seemed unnecessary to take into account the suffering it was claimed the speech would cause.

Whether explicitly or implicitly, the classical defense of free speech views actions, but not words, as capable of inflicting cognizable injury. When injurious conduct occurs, the society, of course, may properly intervene and take appropriate measures to protect itself. But until that point is reached, nothing really has "happened" and so the society possesses no legitimate basis for intervention. It is also, it may be noted here, this perceived differential in the harm-producing capacity of conduct as opposed to speech that is commonly seized upon as a justification for the differential treatment accorded the two areas of behavior.

If we are to understand what harm speech can cause (or, to put it more accurately, what harm is potentially caused by prohibiting intolerance of speech activity), we really must know something about what drives people to want to suppress speech in the first place. Even if we assume, as the classical perspective does, that speech involves only a "risk" of something else that is truly harmful, we ought to know something about what people actually perceive to be the risk and what kind of effects there are on people who are exposed to that risk. In short, we should try to understand why people want, or need, to suppress speech acts through the operation of law.

Investigation of the modern free speech literature for thoughts about the origins of the need to suppress speech yields surprisingly little. There are frequent references to the emotion of fear, when the discussion turns to describing the motivations of those who seek to punish speech. "Those who won our independence by revolution were not cowards," Brandeis wrote in the Whitney case, saying by implication that those who seek to suppress speech are. "To be afraid of ideas, any idea, is to be unfit for self-government," Meiklejohn asserted. If fear mo-
tivates the desire for intolerance, then fear of what? The question is seldom answered.

We do, however, have one well-known statement on the need for legal suppression, again from Holmes, which he offered in his Abrams dissent. Just before his famous marketplace-of-ideas theory of free speech, Holmes spoke of how "[p]ersecution for the expression of opinions [is] perfectly logical." In his remarkable and pithy style, Holmes explained the logic: "if you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises." Such a view, Holmes added, is shortsighted, at which point he made his celebrated recommendation that we place our faith in the "competition of the market."

Holmes's remarks on the need to restrict speech offer a useful point of departure for any analysis of the nature of censorship. He confirms, though by the rather odd use of the term logical to describe the desire for "persecution," the naturalness of the impulse to prohibit certain speech. And he, like others before him, notably Mill, centers that impulse on the nature of human "beliefs." The impulse flows from the desire to protect those beliefs against contrary ones.

Although Holmes's remarks are readily seen as interesting and revealing, their real significance may not at first be apparent. Of special importance is his characterization of censorship as fundamentally a form of expression—actually, speech—that counteracts the messages one would otherwise naturally communicate through toleration or passivity; for "to allow opposition by speech seems to indicate" the series of messages he describes.

The act of speech, therefore, puts those who know of it, and who believe differently, in a serious dilemma. For them it is not simply a matter of choosing not to be offended—perhaps by "averting the eyes"—or a matter of standing like some outsider who is observing a process of potential persuasion at work. The dilemma they face is significantly more complex, for by doing nothing—by being tolerant—they may be contributing to the success of the beliefs they dislike. They are now, like it or not, part of a dynamic process, from which they can withdraw only at the risk of furthering that which they oppose. And that is why, as Holmes tells us, people in this situation are "naturally" inclined to "express [their] wishes in law and sweep away all opposition."

Both tolerance and intolerance, therefore, are communicative acts—speech in the simplest and purest sense—that spring from the need to make one's position in the world clear. The point, however, is rarely appreciated. Yet, to see this dilemma that arises from the communicative significance of each posture helps us to better understand the strength of the need for prohibiting certain speech activity. Given the fact that free speech theory itself urges us to recognize the tremendous need of every individual to express himself or herself, we can hardly ignore or minimize the power of that need just because it arises in the form of restraints on the speech of others.

Even this rich insight into the origins of the need to restrain speech activity, however, raises some puzzling problems. If we see intolerance as a form of expression intended to avoid creating the wrong impression—either that we don't really believe what we claim to believe or that we don't have the courage of our convictions or the power to defend them—we might well wonder why the desire should be so strong, if, as Holmes says, "you have no doubt of your premises or your power." Holmes's vision of intolerance postulates a relatively fixed and certain mind, one confident of belief, will, and power. But under those circumstances, restraint seems an odd enterprise, like rushing outside to crush a bee seen through a window.

Here reality becomes more complex than Holmes' statement supposes. It is perhaps less the certainty of our convictions that prompts us into intolerance than their uncertainty. Are there really any beliefs or values to which we regularly profess alle-
giance that we can honestly say we are completely confident of—either of our actual belief in them or of our courage to act on them should they be challenged? Even if we are confident of our own minds, we can rarely be sure of the beliefs of others, on whom in nearly every instance our own beliefs depend for success. The upshot would seem to be that beliefs and will are dynamic, always in flux, inevitably uncertain, and, at least at times, seemingly very fragile. That is why there is such a great need for individuals and communities to engage in expression, to reaffirm beliefs; that is why we encounter an endless fascination in societies with examining just how one would behave under circumstances where belief and commitment to belief (which perhaps are the same thing) are put to the test; and that is why, in the end, people draw the inferences they do about doubt and weakness of resolve from the posture of passivity or tolerance—not because they always coincide but because they do so with enough frequency that it provides a reservoir of human experience from which to draw such inferences.

The trouble with speech behavior, therefore, is that it very often demands a response from those who know of it. It compels us to act in response, and in that sense it exerts a controlling power over other people’s behavior. It is agenda-setting, for without any response, messages different from those we want to be communicated are communicated. We can no more afford to ignore these feelings than we can the need to mourn the death of someone close. Thus, not only can speech lead us into errors of judgment by playing on our passions, as we recognize in the context of trial, and in that way distort the truth-seeking process; it can also distract us from dealing with other issues that ought to have a higher priority or, for that matter, distract us from pursuing other goals we may seek alongside the search for truth (social harmony, collegiality, mutual respect, and so on).

The entire subject of interaction between speakers and listeners is, therefore, a matter of considerable complexity. We trivialize the problems speech behavior can pose for any individual or community by speaking simply of the risk of the speaker’s persuading some weaker minded listeners or of the offense that some listeners will experience at the speech, as something equivalent to a momentary pain one feels from a cut or a stubbed toe: Pain is experienced when others speak in ways we feel are wrong, as genuine and as real as the pleasure we feel in others’ happiness or the sadness in their misfortune, arising perhaps from the same emotional capacity of imaginative projection, or what we call empathy. But it is also the case that the identities of those witness to an event become implicated, and to some extent controlled, by the event itself. The values and beliefs that together define the group or broader society exist in a state of some flux, in which both belief and the willingness to act on them and in their defense must be settled and resettled again and again.

In this general way, therefore, speech can produce important harms. This, of course, is clearly revealed when speech is explicitly insulting or threatening to particular individuals. The identity of these individuals is now in jeopardy not only because others may be “persuaded” to think less of them but also because others will be watching to see how they respond. The problem is hardly insignificant. However much as individuals we may try to disconnect our own feelings about ourselves from the feelings that others bear toward us, we are never more than partially successful, as Isaiah Berlin noted in a well-known essay:

For am I not what I am, to some degree, in virtue of what others think and feel me to be? When I ask myself what I am, and answer: an Englishman, a Chinese, a merchant, a man of no importance, a millionaire, a convict—I find upon analysis that to possess these attributes entails being recognized as belonging to a particular group or class by other persons in my society, and that this recognition is part of the meaning of most of the terms that denote some of my most personal and permanent characteristics. I am not disembodied reason. Nor am I Robinson Crusoe, alone upon his island. It is not only that my material life depends upon interaction with other men, or that I am what I am as a result of social forces, but that some, perhaps all, of my ideas about myself, in particular my sense of my own moral and social identity, are intelligible only
in terms of the social network in which I am (the metaphor must
not be pressed too far) an element. 44

The interconnections between the individual self and social percep-
tions is true for groups of people as well as for individuals,
which, of course, is why racial and religious slurs are so hurtful.

In fact, we are routinely concerned, and properly so, with the
way other people are thinking about us, whether it be revealed
by speech or other behavior. For confirmation of the reality of
this kind of injury we need look no further than to the juris-
prudence of free speech itself, to what laws have been sanctioned,
and even to the types of arguments that are made in support of
free speech positions. For example, our rules against defamation
and the publication of embarrassing personal facts, as well as to
some extent our laws of private property, which help secure
information against public disclosure, recognize the fact of the
human condition that one's self-esteem is to a considerable de-
gree related to what those around one think. Even more im-
portant, what people think is in some important measure
dependent on one's response, so that to control the response is
to control what others think. This fact has sometimes even be-
come the basis for free speech claims, as individuals or organi-
izations compelled by the state to give assistance to speech they
disapprove of have argued that their own free speech rights
have been thereby infringed. 45

Even free speech theory itself makes rhetorical use of our
fundamental concern with the minds of others—though we seem
unable to recognize it as such because of our tendency to give
excessive weight in developing free speech theory to our interest
in obtaining information. It is sometimes said, for example, in
defense of the free speech principle that a government's decision
to censor information because of a distrust of the citizens' ability
to use the information properly interferes with our interest in
maintaining our personal "autonomy," which is defined as mak-
ing our own decisions (including whether to obey the law) after
receiving all available information. Such a view has powerful
intuitive appeal. Its appeal rests not only in the description of
us as being interested in obtaining all the information we need
to make good decisions. It is partly that but not entirely, for it
is clear once we examine our own lives that we do not always
sacrifice other interests we have in order to acquire all available
information. 46 The appeal of the argument is rather in the need
we feel to object to, and forbid, the government's act because it
is based on a view of us as incompetent. The thought is insulting
and demeaning. We may not care at all about having the par-
ticular information that would have been communicated by the
censored speech, but we care very much that the government
not think of us as incompetent, just as we might very well feel
insulted at not being invited to a dinner party we would actually
dread attending. Our own sense of ourselves, our identity, is at
stake; and we also think that if officials are taking this view of
us, then we had better stop them now before they act on it in
other ways too.

Thus, free speech argumentation itself sometimes makes use
of our natural and proper concern with the thinking at work in
other people. We should also learn from this the importance of
not confusing the real basis of our objection with other, more
immediately practical interests, such as our interest in acquiring
information. Were we to decide ourselves what to hear and what
not to hear, we might very well choose not to listen to the very
same speech the earlier censorship of which we so vigorously
objected to; we might decide to forbid it for precisely the same
reason, namely, that the speech act was insulting and threaten-
ing.

These general observations about the injury speech is capable
of inflicting can be tested in the concrete context of Skokie. We
have already noted how speech may cause us to fear for our own
safety and well-being. The fears of anti-Semitism being stimu-
lated by the willingness of a group to publicly don the Nazi
uniform and then parade in a heavily Jewish community cannot
be dismissed as illogical. Indeed, with some speech acts we easily
grasp this psychological reality and, on that basis, forbid such
acts by law. During the Skokie litigation, for example, many Jew-
ish residents of the community received anonymous telephone calls in which the caller would issue threats and anti-Semitic statements. We can all appreciate the fear these people must have felt for their own personal safety and for those near to them. The injury is similar to that suffered when a person is the victim of a crime, as when a burglar enters the home in the night. The property loss experienced will often be minimal when compared with the emotional, or psychological, injury inflicted by the threat implicit in the burglar’s act. In all likelihood, the victims will long thereafter suffer the fears and pains of this personal violation, which consists in part of the greatly enhanced sense of their own personal vulnerability to a repetition of this crime and others they will now so vividly imagine and in part to internal doubts about how they should or would respond to those violations.\(^{45}\)

The costs of these acts, however, are social as well as personal to the specific victims, and this is where the interactive, or dynamic, character of the speech acts and the identity of the community come into the foreground. For it is the community’s response (or nonresponse) to the harmful speech act that will in some measure define the community—a reality that sociologists, beginning with Emile Durkheim, have long observed in the context of the criminal law system (even going so far at times as to suggest that communities actually use criminal behavior as an opportunity for self-definition).\(^{46}\) The belief in the wrongness of the acts and the will to protect the individuals and the society against future harmful acts may be thrown into doubt, and like it or not, the issue must and will be addressed. Unless the doubts are resolved, the very anticipation of dissolution can alter the conditions of the community itself, affecting it in countless, untraceable ways—as we periodically see with rises in the popular fear of crime, which can alter the political landscape through changes in voting patterns (a phenomenon that German Nazis deliberately utilized in their drive for power in the 1920s and 1930s).\(^{46}\)

On a small scale this was dramatically brought to the surface in the Skokie litigation—though it was surprisingly mishandled by the various participants, thus further indicating the difficulty we have in integrating into the classical analysis of free speech issues a sophisticated understanding of the potential harm from speech. One of the arguments advanced by the city was that it should be entitled to prohibit the march because it would disrupt the community’s fair housing program.\(^{46}\) The claim never got anywhere, ultimately slipping by the wayside as if it were something of a makeweight—which, on the face of it, it certainly seemed to be, since it was hardly self-evident how the march would seriously interfere with a community policy of creating a housing market free of racial prejudice. Yet, as one reads through the record in the case, and particularly the testimony offered by the mayor of Skokie, one can see that a perfectly sensible—really quite powerful—argument was contained within this superficially slight claim. Regardless of whether the argument was ultimately true or not in this case, it was certainly plausible and sufficiently important to warrant careful attention.

In essence, the city’s claim was this: The population of Skokie was more or less evenly divided between Jews and Christians, two groups that had tried over the years to live together harmoniously. The relationship, however, had always been fragile, sometimes only a matter of simple coexistence, sometimes almost erupting in hostilities. The city had also tried to accommodate a growing black population within its boundaries, as the migration of blacks from the inner city of Chicago had steadily brought them to Skokie and an adjacent suburb to the north. But these efforts at maintaining a peaceful community environment between potentially hostile groups were unfinished by the time of Skokie; tensions remained beneath the surface. What the city feared, therefore, was that the Nazi march would activate these other tensions within the community.\(^{51}\)

Why there should be a link between the Nazi march and these other tensions may be difficult at first to see. But a potential link is certainly there. The events in Skokie raised a question about the prevalence of anti-Semitism generally in the society, not only
in its extreme form as represented by Collin’s group but in its less overt forms as well. Questions were always hovering about the case: about the depth of our sensitivity to the interests of those who would be most directly injured by the speech (primarily the concentration camp survivors in Skokie), about our rejection of this kind of racial hatred, and about our preparedness to act against more explicit manifestations of it. There was, conceivably, even a question in the minds of some Jews that some people perhaps actually wanted them to suffer the injury of the Nazi march—a motivation that need not have been anti-Semitic at root but could have arisen out of anger over issues having little or nothing to do with racial or religious prejudice.

The issues raised by Skokie, therefore, transcended the simple possibility that the Nazi march would persuade some members of the audience or the general public to embrace all or part of the Nazi doctrine or that it would offend its immediate audience. The event bore the potential for enormous symbolic meaning, whatever was done by the various participants in the drama. (The possible connections between the particular events in Skokie and the general level of anti-Semitic behavior in the larger society were, in fact, noted in the popular press at the time. There were, for example, reports of an increase in attacks on synagogues and members.)

Thus, Wigmore was certainly correct when he pointed out that it is inappropriate to deny society the right to prohibit and punish certain speech simply because that particular speech act was unlikely to be successful. A technical violation can encourage others to act similarly, as Wigmore said, but there may be other reasons why we might choose to ignore the likelihood of success in administering our criminal laws, as in fact we routinely do. Sometimes, when viewed in isolation, events can seem insignificant and unworthy of people’s attention, but actually, for whatever combination of reasons, they have been invested by the society with great symbolic significance. What has happened before, or contemporaneously with, the particular act—the overall context in which it occurs—will define its social meaning. Events frequently take on such extra baggage of meaning for people, and when this occurs, it is unfair to segregate them from their context and demote them of the real meaning they possess.

We must appreciate the depth and the power of the conflicts people face when confronted with behavior they regard as wrong, immoral, or injurious to others. For each individual as well as the community, the response taken is self-defining. By a tolerant or divided response, in particular, the individual and the community can be made to feel implicated in, and their identity tarnished by, those acts. A subtle but nonetheless extensive process of dissolution can then occur by denying the individual or group the means of responding to the behavior they find troublesome. People must have some means of demonstrating commitment to their beliefs and determination to defend them. We recognize and act on these needs all the time, especially as we set about the business of enacting laws and punishing violations. They are what induced President Jimmy Carter to boycott the 1982 Olympic Games, a policy borne (at least in part) of a feeling that to pursue a business-as-usual course in the face of the invasion of Afghanistan would implicitly sanction that act of aggression. They are what led the justices of the Supreme Court in Brown v. Board of Education, and its sequels, to want to present those decisions as the results of a unanimous and undivided bench. They are what made the judges in the Skokie case announce their own “personal” views about the speech they found it their professional responsibility to protect.

But there is another objection to punishing speech acts to be considered. Assuming we agree—it is said—with the arguments just advanced about the complexity of the harm from enforced toleration of speech acts, it remains the case that you possess other means, besides legal prohibition, by which to satisfy the needs of intolerance. Most important, you retain the opportunity
to express your own positions on the issues raised. So long as that opportunity is available to you, you need not possess the power to silence others from speaking as they wish.

This is a commonly heard argument in free speech disputes. At the outset we should note that the availability, by itself, of other means of accomplishing the ends we seek does not explain why we may justly be deprived of some. But it is also doubtful that any real equivalence exists between official restraints on speech and other means of self-help. We suffer a serious loss when we strip ourselves of the use of legal restraints against speech behavior we regard as socially destructive. It is easier to organize an official response through the lawmaking process. Procedures for this are established and readily available. But its primary value for us is as a communicative tool for satisfying the need of the community to express its position on the issues raised by the speaker and in doing so to define and create itself.

Law plays a special role in this country. It provides a process through which we create a social identity, by which we reflect and embody the aspirations and values of the community. Enforcement of the law bespeaks a commitment to those aspirations and values. We all know the importance of maintaining through our public institutions a level of behavior that rises significantly above what we otherwise insist on. That is why public officials must resign when they say things in public that demonstrate an insensitivity to the values we are trying through our public institutions to achieve. To some degree, to be sure, the public posture the society presents to the world exists in many layers and not all of them are official. Other individuals, groups, and institutions within the society—such as religious organizations and private societies—sometimes speak "for" the general society in the way that law does. It is true, for example, that in Skokie such groups did come forward to address the issues involved, and in doing so helped to assuage the fears of many people on the matter of anti-Semitism. Still, it seems reasonable to think that we gain by keeping open to ourselves the possibility of responding to behavior we believe harmful through our lawmaking process.

IV

To conclude that speech activity can cause very serious social harm is not to say that all speech that causes harm ought to be prohibited. The same point works the other way, too: The fact that speech can bring valuable benefits to us, as individuals and as a community, does not mean that we ought to restrain ourselves from ever regulating it. The problem is finding the right balance, which, of course, requires that we make a judgment. We balance the harms against the benefits with respect to nonspeech behavior, and we make judgments about what should be free and what restricted. If we were to do the same with speech activity—to feel free to render a true accounting of the benefits and harms—would we arrive at the results we now do under the free speech clause of the First Amendment? Would we say that the benefits of speech identified under the classical model are so present in the "speech" acts at issue in Skokie that they outweigh the full range of injuries likely to be experienced by those acts?

At the very least, it seems unsatisfactory to construct our thinking about free speech so heavily, and so uncritically, out of the building blocks excavated from another era, when the needs of the society and the materials available were potentially so different from those in our own time. However useful it may be as a heuristic device to take the traditional New England town meeting as a paradigm for thinking about free speech in twentieth-century United States, as Meiklejohn did, there are serious risks of oversimplification involved in making that our comparative model. Close, tightly knit communities possess a degree of control over their members that is simply lost in a society numbering in the hundreds of millions of people. Homogeneity is
no longer the central characteristic defining its people, but rather its opposite.

At times with the conventional libertarian defense of free speech, there can be a virtual denial of any social risk like propaganda and manipulation of public opinion by speech, despite the repeated experiences of other countries in this century to the contrary. Indeed, the Politynaish claim that the truth will always win out as a natural result of evolutionary processes deserves the brushing aside that Alexander Bickel gave it when he remarked: "[W]e have lived through too much to believe it." Only by recurring to the empty plea that we think in terms of the "long run" can anything be salvaged from the argument, and to nearly all of us, it is rightly said, the long run will always come too late.

There have been few serious attempts to integrate into the general free speech discourse a more complex and realistic view of modern society. After World War II a few writers discussed the need for a reappraisal of the classical assumptions about the impact of propaganda and manipulative political rhetoric on political behavior, noting how the development of a mass communications media and the rise of a new "mobile public opinion" made a wide-open attitude toward speech a more socially precarious policy. The Supreme Court's decision in the Beauharnais case, mentioned in chapter 1, seemed to take some stock of this way of looking at things, as did a few other opinions. Such a perspective, however, has never really been woven successfully into the fabric of our free speech jurisprudence. Today one still finds the typical encomiums to the capacities of citizens to handle their own affairs, with the asserted role of the courts being simply to facilitate that process by keeping the government at bay.

The consequences of this simple approach to free speech questions in the twentieth century cause us to stumble on both sides of the problem, in appraising both the potential benefits we derive from protecting speech and the potential harms. If we conceive of the benefits as those we derive from the best uses of speech, it is not surprising that we have little to say at the margins, where these values will necessarily be attenuated and flooded with other concerns. The merits claimed for free speech are going to have difficulty bearing the full weight of the harms that can be expected. Not surprisingly, a tendency is exhibited at this point to underestimate those harms.

This kind of refusal to think openly and critically about problems connected with the idea of free speech is present with respect to the other two fundamental issues for free speech theory noted at the end of chapter 1—namely, the problem of justifying the special protections afforded speech and not other, non-speech acts and the problem of justifying the placement of the interpretative and enforcement functions connected with a free speech principle in the hands of the judiciary. We shall defer addressing these problems for the moment, keeping our attention fixed for the time being on the issue of the degree to which we should limit our authority to regulate speech activities.

Free speech thought is possessed of a kind of schizophrenia, however, and there is another side to it that we frequently encounter in the theoretical accounts and in the cases. It differs rather fundamentally with the premises of the classical model, at least on certain basic issues. It is a vision of free speech, however, that works largely out of public sight, a kind of north slope of First Amendment thought. Here, where the sun's rays penetrate only indirectly, we encounter a more complex and less naive understanding of the role of free speech in modern society. With the more official rhetoric and vision of the classical model, it is regularly engaged in hidden tension.